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BLACKWATER WORLDWIDE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware corporation dba BLACKWATER WORLDWIDE,

Plaintiff,

v.

KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive,

Defendants.

Case No. ______________

COMPLAINT FOR:

(1) INJUNCTIVE RELIEF;
(2) DECLARATORY JUDGMENT;
(3) VIOLATION OF 42 U.S.C. § 1983 (PROCEDURAL DUE PROCESS);
(4) VIOLATION OF 42 U.S.C. § 1983 (EQUAL PROTECTION);
(5) DORMANT COMMERCE CLAUSE;
(6) VIOLATION OF CAL. CONST., ART. I § 7(A) (PROCEDURAL DUE PROCESS)
(7) VIOLATION OF CAL. CONST., ART. I § 7(A) (EQUAL PROTECTION)

DEMAND FOR JURY TRIAL

Plaintiff Blackwater Lodge and Training Center, Inc. dba Blackwater Worldwide ("Blackwater") alleges upon knowledge as to itself and its own actions, and upon information and belief as to all other matters, against Defendants Kelly Broughton in his capacity as Director of the Development Services Department of the City of San Diego, the Development Services Department of the City of San Diego (the "Department"), Afsaneh Ahmadi in her capacity as the Chief Building Official for the City of San Diego (the "Building Official"), and the City of San Diego (the "City") as follows:

NATURE OF THE ACTION

1. This is an action to, *inter alia*, enforce the provisions of the San Diego Municipal Code ("SDMC") and to remedy the City of San Diego's violation of Blackwater's federal and state constitutional rights to procedural due process and equal protection, as well as those under the Commerce Clause of the U.S. Constitution. Blackwater has a multi-million dollar contract from the United States Navy to train sailors. To perform its duties under the contract, Blackwater secured the rights to use a remote facility in Otay Mesa, on the outskirts of the City of San Diego. See Exhibit A for visual depiction of area. Blackwater then applied to the City for the building permits needed under the SDMC to remodel the facility by adding internal walls, air conditioning units and an insulated target range. Initially, the City complied with its responsibilities under the SDMC, granting Blackwater all needed building permits. The City subsequently conducted the inspections prescribed by the SMDC, inspecting and approving the facility's electrical and fire/life safety infrastructure. Finally, on April 30, the City's Building Official issued final approvals for the facility, including granting approval for its Certificate of Occupancy. As Defendant Broughton reportedly admitted in a recent news story, Blackwater "complied with our municipal code and the California Building

Code" and, consequently, the City issued to Blackwater the proper permits and approvals.

2. After the City issued these permits and approvals, but before the City performed its ministerial duty of issuing the Certificate of Occupancy, certain self-proclaimed activists began complaining loudly about the location of "mercenaries" in San Diego. They incorrectly alleged Blackwater was locating in the City not to fulfill its Navy contract, but to conduct covert border operations in close proximity to Mexico. And they openly stated that they wanted to kick Blackwater out of town because it provides support to the United States in the war in Iraq and because it is a North Carolina-based defense contractor.

3. Unfortunately, these activities had their intended effect, leading the City to refuse to issue the Certificate of Occupancy notwithstanding its obligation to do so. No doubt this occurred because this year is an election year. Indeed, Election Day is June 3, and the Mayor and City Attorney are both standing for re-election and are locked in tough struggles. In an apparent effort to curry favor with the activists and after his election opponent raised the Blackwater permits as an election issue, the City Attorney on May 16, 2008 issued a legal memorandum incorrectly concluding, among other things, that the Blackwater project should be subject to further discretionary review.[1] Given the California Attorney General's recent report regarding "The Sunroad Building Project," it appears that the City Attorney has a pattern of issuing flawed reports to serve political purposes.

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[1] Like most municipalities, San Diego's zoning code denotes three general categories of uses. Although different cities call them by different names, the first such category could be described as "prohibited under all circumstances." In many cities, examples include, a topless bar serving alcohol or a dump/landfill. The next category could be called, "discretionary," as those uses must go through the city's discretionary review process. An example would be locating a bar within 1000 feet of a residential neighborhood. The final category could are usually called "ministerial review," meaning that if a city inspector checks the site for certain clearly defined features set forth in the code (for example, fire doors and lighting, and proper number of parking spaces), the city has no discretion is permitting the facility. As detailed below, vocational institutions, instructing in any subject, fall under this third category in San Diego.

7. If Blackwater is unable to start training the Navy's sailors on June 2, it will be irreparably harmed in that its constitutional rights will have been violated, its reputation severely damaged, its contractual relationship with the Navy jeopardized, and its ability to train the country's armed forces severely compromised, which can have tragic consequences as described below.

8. Accordingly, Blackwater seeks declaratory and injunctive relief for the City's violation of its own Municipal Code and Blackwater's constitutional rights. Moreover, Blackwater seeks to recover all money damages caused by Defendants' conduct.

JURISDICTION AND VENUE

9. Blackwater seeks, *inter alia*, to remedy the City of San Diego's violation of Blackwater's federal constitutional rights, pursuant to 42 U.S.C. § 1983, and under the dormant Commerce Clause. Accordingly, this Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343.

10. This Court also has diversity jurisdiction over this action under 28 U.S.C. § 1332 because complete diversity exists between Plaintiffs and Defendants. Blackwater is incorporated in Delaware with its principal place of business in North Carolina. Defendants all are citizens of California. The amount in controversy in this case easily exceeds $75,000, exclusive of interest and costs, as the contract with the Navy is worth about $400 million.

11. This Court has supplemental jurisdiction over the state law claims sought herein, pursuant to 28 U.S.C. § 1367, because these state law claims are so related to the federal law claims over which this Court has original jurisdiction, that they form part of the same case and controversy under Article III of the United States Constitution.

12. Venue is proper in this District under 28 U.S.C. § 1391 because all the Defendants reside in this District, the property that is the subject of this action is

located in this District and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

THE PARTIES

13. Plaintiff Blackwater Lodge and Training Center, Inc. dba Blackwater Worldwide is a Delaware corporation and has its principal place of business in North Carolina.

14. Defendant Kelly Broughton is a citizen of the State of California and is sued in his capacity as Director of the Department of Development Services of the City of San Diego.

15. Defendant Department of Development Services is an agency of the City of San Diego.

16. Defendant Afsaneh Ahmadi is a citizen of the State of California and is sued in her capacity as the Chief Building Official for the City of San Diego.

17. Defendant City of San Diego is a municipal entity in the State of California.

18. Plaintiff is ignorant of the true names and capacities of defendants sued as DOES 1-20, inclusive, and therefore sues these defendant by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and based thereon alleges that each of the defendants designated as a DOE is responsible in some manner for the wrongful acts and omissions referred to herein and thereby proximately caused injuries and damages to Plaintiffs as herein alleged.

FACTUAL BACKGROUND

Blackwater's Contract with the United States Navy

19. Blackwater Worldwide professionals are U.S. military and law-enforcement veterans dedicated to training military law-enforcement personnel at home and protecting U.S. dignitaries abroad. One of Blackwater's primary functions is to protect the lives of U.S. diplomats in Iraq. Though it is not the

biggest government contractor, it is among the most high-profile. Lately, certain individuals and interest groups have stigmatized Blackwater for its support of the United States' efforts in Iraq, and in particular for Iraqi casualties suffered during firefights that have occurred during Blackwater's protection of civilians in Iraq. Attacking Blackwater has become a cause célèbre for certain individuals wishing to express their displeasure with the war in Iraq or how the administration has handled it.

20. A lesser known function of Blackwater is providing training for the men and women of the United States Navy. In 2000, terrorists attacked the U.S.S. Cole by sailing up to it in a slow-moving craft laced with explosives, killing 17 Navy sailors and injuring 39 others. After concluding that its sailors could have defended themselves from the assailants had they been better trained in basic firearm usage and tactics, the Navy contracted with Blackwater to train its sailors on the safe, effective use of small personal weaponry and other apprehension techniques.

21. Blackwater located the facility that is the subject of this suit in San Diego because the Navy contract required close proximity to Naval Base San Diego, the largest naval base on the West Coast, and also within San Diego's city limits.

22. The services Blackwater has been providing to the Navy over the past five years include a vocational training program for sailors. Blackwater's training programs for sailors will teach a variety of skills, including marksmanship, assembly and disassembly of firearms, basic arrest and apprehension techniques, and proper safety for the latest state-of-the-art personal weaponry. This type of training is expected to improve our sailors' ability to protect our country, our Navy ships and themselves.

23. Pursuant to this contractual relationship with the Navy, Blackwater is required to begin training its next class on June 2, 2008.

24. If Blackwater is unable to meet the June 2, 2008 deadline for commencing its training facility, it risks being unable to satisfy its contractual undertaking and being unable to train the nation's sailors as contemplated. Additionally, if Blackwater is unable to meet this deadline, its reputation will be severely damaged and its contractual relationship with the United States Navy jeopardized. This damage to its reputation could well result in the loss of other contracts and likely would damage Blackwater in an amount that is difficult, if not impossible, to quantify.

Blackwater Identifies the Training Site and Obtains All Necessary Permits

25. To provide the services required by the Navy, a site must have space for vocational/classroom instruction and a target range. As a leading site for the training, Blackwater identified and leased a warehouse located at 7685 Siempre Viva Road in the Otay Mesa Development District in the City of San Diego (the "Otay Mesa facility"). Blackwater was not required to obtain an Otay Mesa Development Permit for the Otay Mesa facility because it is a vocational school, which is exempt from such permits under SDMC §§ 1517.0202(a)(2), 1517.0301, 131.0622 and Table 131-06B to 131.0622.

26. Initially, Blackwater hoped to work with Southwest Law Enforcement Training Enterprises, an independent and respected San Diego based law-enforcement training partnership, in creating and running the Otay Mesa facility. Blackwater and Southwest Law Enforcement conducted arms-length negotiations over a contract related to the Otay Mesa training facility.

27. In September 2007, Southwest Law Enforcement applied for a Building Permit to construct 44 feet of new partitions in the Otay Mesa facility. SDMC § 129.0212 provides in pertinent part: "A decision on an application for a Building Permit *shall* be made by the Building Official in accordance with Process One. The Building Permit shall be approved if the Building Official finds that the work described in the permit application, plans, specifications, and other data

comply with the requirements of the Building Regulations, other applicable laws and ordinances, and any applicable development permit." (Emphasis added.) See also SDMC § 112.0501, Diagram 112-05A (depicting "Process One" to include only staff level ("ministerial") review).

28. The Building Permit for construction of the partitions was granted and Blackwater began developing the Otay Mesa facility.

29. By late spring, Blackwater and Southwest Law Enforcement were not able to come to mutually agreeable contract terms; thus, their relationship ended with regard to the facility. Nonetheless, Blackwater continued to create the training facility and prepare for the training classes. There is no requirement that Blackwater change the name of the entity to which the permit was issued because the rights provided by the permit relate to the facility.

30. Blackwater's affiliate, Raven Development Group, which specializes in the creation of training facilities, assisted Blackwater with its construction of and preparations for the Otay Mesa facility. For example, in February 2008, Raven filed two applications for Building Permits for the Otay Mesa facility. These permits were for (1) installing two new air conditioning units and six exhaust fans, and (2) adding an indoor target range. These permits were granted, and Blackwater, assisted by Raven, began installing the additional air conditioning units and exhaust fans and constructing the indoor target range.

31. At the site, an indoor target range will be used for training related to marksmanship and the use of firearms. Under the SDMC, Blackwater was required to obtain a building permit for the target range, but was not required to obtain any other approvals. Indeed, SDMC § 53.10(d) explicitly exempts target ranges from all San Diego firearm restrictions, including council approval. In fact, after a reasonable investigation, Blackwater has been unable to identify any instance in which the City Council has been asked to approve a gun permit for a target range at

a training facility or vocational or trade school, or when a target range was required to comply with the discretionary process now being imposed on Blackwater.

32. The same disparate treatment applies to vocational facilities instructing in similar subjects. For example, Southwestern College operates a Peace Officers Standards and Training (P.O.S.T)-certified police academy at 8100 Gigantic Street, *less than a quarter mile from Blackwater's Otay Mesa facility*. On information and belief, Southwestern College was not required to obtain from the City Council any special approval to operate as a vocational institution. On further information and belief—and despite initial claims to the contrary—other vocational institutions, including privately-run institutions, exist in the Otay Mesa area and were not required to obtain the approvals that Blackwater was told it must obtain, or follow the process being imposed on Blackwater.

33. After informing the Navy that Blackwater would be able to satisfy the Navy's West Coast training needs, Blackwater prepared for the training classes that will be offered at the Otay Mesa facility by, *inter alia*, sending offer letters to potential instructors and by arranging with vendors to purchase supplies and training materials. Blackwater also leased the facility at a cost of $35,000 per month, and spent hundreds of thousands of dollars renovating the facility.

34. In short, Blackwater complied the SDMC permit and approval requirements, as recently admitted by Defendant Broughton:

> Earlier this month, the Mayor Jerry Sanders launched an inquiry into how Blackwater obtained its permits. One issue under review is why the development services department classified the company's navy training center as a trade school. David Potter is a former planner with the city. He says no city rules exist that would exclude the project from operating as a trade school.
>
> Potter: The zone clearly allows that but doesn't define what it is....so I would say this qualifies as vocational training.
>
> And that's why development services director Broughton says even if Blackwater had been listed on the permit applications, his staff wouldn't have done anything

differently.

Broughton: I don't see that I would have had any other choice but to approve it because it complied with our municipal code and the California Building Code.[2]

Blackwater Should Not Be Required To Undergo The City's Proposed Discretionary Process

35. The Otay Mesa Development District requires a development permit or an exemption from the permit requirement. Blackwater is exempt from the permit requirement because its facility—a trade/vocational school—is in compliance with this Ordinance. SDMC §1517.0202(a)(2).

36. Vocational/trade schools, such as Blackwater's training facility, are permitted uses as of right in the Otay Mesa Development, pursuant to two distinct provisions of the Municipal Code. SDMC § 1517.0301(a)(1) specifically authorizes "[a]ll uses permitted in the IH-2-1 zone." It further exempts facilities permitted in the IH-2-1 zone from obtaining any special permits, including an Otay Mesa Development Permit. Vocational schools are permitted in the IH-2-1 zone, under SDMC § 131.0622, Table 131-06B. Thus, because Blackwater's facility, a vocational school, would be permitted in the IH-2-1 zone as a matter of right, it is similarly permissible, as a matter of right, in Otay Mesa.

37. A vocational school also is permissible in Otay Mesa under SDMC § 1517.0301(a)(8)(A). That section allows a trade school to operate that instructs in subjects *related* to a use *permitted* in the Industrial Subdistrict. The Industrial Subdistrict allows for a wide variety of uses, including: (1) scientific research and development activities; (2) manufacturing plants requiring advance technology and skills; (3) facilities engaged in the production of experimental products; (4) general industrial uses (defined as "Establishments engaged in the . . . manufacturing . . .

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[2] KPBS, *San Diego City Hall Probes Permit for Blackwater Facility,* by Amita Sharma, May 20, 2008, available at http://www.kpbs.org/news/local;id=11738.

testing [or] servicing . . . of a wide range of products"); (4) storage warehouses; and (5) facilities involved in the wholesale distribution of various goods (including machinery, equipment, and supplies), pursuant to SDMC §§ 1517.0301(a)(2)(A), (2)(B), (2)(D), (3), (6)(A), (6)(B), *et seq.* Thus, if the subjects taught at Blackwater's vocational facility relate to *any* of these permissible uses, it is also permissible.

38. Blackwater's facility will instruct in a variety of subjects, all of which are related to permitted uses in the Otay Mesa Industrial Subdistrict. For example, Blackwater's facility will instruct on proper safety techniques for using the latest state-of-the-art personal weaponry. Because facilities engaged in researching and developing this weaponry are permitted in the subdistrict, a vocational school instructing end users on how to properly employ these devices would also be permissible. Blackwater's facility will also instruct students on how to assemble and disassemble firearms. Because facilities engaged in the manufacturing of firearms and firearm components are permitted in the subdistrict, a vocational school instructing individuals on how to assemble these items would also be permissible. Although it is by no means required that such weapons actually be manufactured in the subdistrict for weapons training to be permitted, it is certainly notable that a facility constructing Navy training drones employing live rocket motors is located *next door* to the Otay Mesa Facility.

39. Blackwater does not require approval by the City Council to train sailors on the proper use of firearms at the facility. SDMC § 53.10(d) clearly permits the discharge of firearms, without discretionary council approval or CEQA review, if the firearms are discharged at a facility instructing on the proper use of firearms and allowing individuals to engage in target practice. Such facilities are called target ranges. By exempting from special approval processes the places where San Diegans (and in this case, the men and women serving in the U.S. Navy) may practice gun safety and gun accuracy, the Municipal Code is consistent with

the public policy of the State of California, which similarly exempts target ranges from even the strictest of gun laws.[3]

40. In sum, the Blackwater facility is clearly a vocational school. Vocational schools are permitted in Otay Mesa—as a matter of right with no need for discretionary or CEQA review—under two separate provisions of the Municipal Code.

San Diego City Officials Inspect Blackwater's Facilities and Give Blackwater the Right to Occupy the Facility

41. During and after the development process, inspectors from the City visited the Otay Mesa facility to inspect the work done pursuant to the three building Permits. Each inspector met with representatives of Blackwater, who specifically identified themselves as Blackwater employees. On March 21, 2008, the City's electrical inspector visited the facility. Meeting with him was Blackwater West Vice President Brian Bonfiglio, who identified himself as a Blackwater employee and provided the inspector with a Blackwater business card. Mr. Bonfiglio also was wearing a Blackwater shirt. The City's electrical inspector approved Blackwater's electrical permits. On March 25, 2008, the San Diego Fire Inspector visited the facility and met with Mr. Bonfiglio, who again identified himself as working for Blackwater, provided the inspector with a Blackwater business card and again was wearing a Blackwater shirt. The Fire inspector approved Blackwater's fire and safety permits. Similarly, Blackwater

[3] *See, e.g.*, Cal. Pen. Code § 12026.2(a)(9) (exempting people traveling to target ranges from California's concealed weapon ban); Cal. Pen. Code § 12027(f) (exempting members of target ranges, whether public or private, from other concealed weapons restrictions); Cal. Pen. Code § 12031(b)(5) (exempting individuals at target ranges from being charged with felony for carrying a loaded weapon); Cal. Pen. Code § 12070(b)(9) (exempting target ranges that loan guns to individuals from California gun-transfer laws); Cal. Pen. Code § 12073(b)(7) (exempting target ranges from certain recordkeeping requirements); Cal. Pen. Code § 12280(k)(1)(C)(i) (exempting target ranges from California assault weapons ban); Cal. Pen. Code § 12285(c)(3) (exempting individuals at target ranges from certain assault weapon registration requirements); and Cal. Civ. Code § 3482.1 (exempting compliant shooting ranges from nuisance liability).

representatives had met with City planners and other officials, and identified themselves as Blackwater employees. No effort was made to conceal Blackwater's management or control over the Otay Mesa facility. Every City staff member must have known they were dealing with Blackwater employees.

42. Blackwater completed the projects for which it obtained permits: constructing 44 feet of partitions, installing air conditioning units and exhaust fans, and installing an indoor target range. On April 29, Blackwater staff and its contractors met with Afsaneh Ahmadi, Chief Building Official for the City of San Diego, at her request. She scrutinized Blackwater's plans, and requested one more walk-through of the facility. The very next day, the City's Structural Engineer conducted a final inspection and, finding that Blackwater was in compliance with all relevant provisions of the SDMC, approved issuance of a Certificate of Occupancy, pursuant to SDMC §§ 129.0113(a) & 129.0114. The Building Official evidenced this approval of the Certificate of Occupancy by stamping the plans for the Otay Mesa facility. He was overheard saying, "everything looked good. I can't *not* sign these plans."

43. All that is left is the ministerial act of sending Blackwater its Certificate of Occupancy. SDMC § 129.0114 ("Issuance of a Certificate of Occupancy." "The Building Official shall inspect the structure and if the Building Official finds no violations of the Land Development Code or other regulations that are enforced by the City's designated Code Enforcement Official, the Building Official *shall* issue a certificate of occupancy") (emphasis added); see also SDMC § 131.0622. Blackwater is informed and believes that it is the City's custom and practice to mail the actual paper Certificate of Occupancy several weeks after the approval. No further permits or approvals are necessary from the City of San Diego before Blackwater commences its training program at the Otay Mesa facility.

Election Year Politics Trigger an Investigation of the Otay Mesa Facility

44. San Diego's Mayor and City Attorney will stand for re-election on June 3, 2008. The Otay Mesa facility that Blackwater intends to open on June 2, 2008 has become an issue in both the Mayor's and the City Attorney's campaigns for re-election.

45. Several self-proclaimed activists have tried to make Blackwater's Otay Mesa facility an election issue. According to The Courage Campaign, "Now it's up to the Mayor and the San Diego City Council to stand up against these mercenaries setting up shop on in California." The Mayor's election opponent, Steve Francis, also sought to make Blackwater a campaign issue by claiming the "Blackwater permit issue raises more questions than it answers," including "[w]hy was this matter not handled in an open and transparent way with public hearings and public comment period?" Indeed, a headline read, "Blackwater Explodes into San Diego Mayoral Race."

46. On April 26, 208, San Diego Councilman Scott Peters, at a rally organized by political activists, began questioning the propriety of the City approving Blackwater's facility. Peters is running for City Attorney against Mike Aguirre. The press covered the issue through late April and early May.

47. On May 5, 2008, the Mayor of San Diego requested that the City's Chief Operating Officer, Jay Goldstone, "conduct an investigation into the permits granted so far and permits yet to be granted" for Blackwater's Otay Mesa facility.

48. Despite not being requested by the Mayor to conduct an investigation, the City Attorney then, on May 16, 2008, issued a Memorandum recommending the issuance of a "Stop Work Order," or, in the alternative, the revocation of the Certificate of Occupancy for the Otay Mesa facility. This Memorandum contains incorrect factual assumptions and reaches faulty legal conclusions and specifically states the City Attorney is "open to considering additional information or facts as they become known." The Memorandum was issued in a transparent attempt for

the City Attorney to garner political support from activists who have been opposing Blackwater's efforts. A copy of the City Attorney's May 16, 2008 Memorandum is attached as Exhibit B.

49. On May 19, 2008, counsel for Blackwater wrote to the Mayor of San Diego—and copied the City Attorney—describing the numerous errors and flaws in the City Attorney's analysis. For example, counsel for Blackwater explained how the City Attorney's claim that "because Blackwater will train members of the U.S. Navy on the proper use of firearms at the facility, the [SDMC] requires a special approval by the city council" was incorrect. SDMC § 53.10 "generally prohibits the use of firearms and allows the city council to issue permits for the same under 'conditions as it deems proper.' However, SDMC section 53.10(d) clearly permits the discharge of firearms, without discretionary council approval or CEQA review, if the firearms are discharged at a facility instructing on the proper use of firearms and allowing individuals to engage in target practice. Such facilities are called 'target ranges.'"

50. Additionally, counsel for Blackwater explained that the City Attorney's contention "that a law enforcement or security training operation does not 'clearly qualify' as a permitted use in Otay Mesa" is incorrect. Vocational schools, such as Blackwater's Otay Mesa facilities "are permitted in Otay Mesa, as a matter of right" under SDMC §§ 1517.0301(a)(1), 131.0622, and 1517.0301(a)(8). A copy of the May 19, 22008 letter from counsel for Blackwater to the Mayor of the City of San Diego is attached as Exhibit C.

The City of San Diego Nullifies Blackwater's Building Permits and Revokes its Approval for the Certificate of Occupancy

51. On the same day, May 19, 2008—not even an hour after Blackwater sent its letter (and certainly before City officials had time to digest Blackwater's factual and legal analysis), and *before* the audit report requested by the Mayor had been issued—Defendant Broughton, in his capacity as Director of the City of San

Diego's Development Services Department, wrote to Mr. Brian Bonfiglio, Vice President of Blackwater, to inform him that the City of San Diego "will not issue a certificate of occupancy" for the Otay Mesa facility. The letter directed Blackwater not to use the "portions of the building identified for use as a shooting range and vocational/trade school…until a certificate of occupancy has been issued for this change of use."

52. Mr. Broughton further asserted that "no certificate of occupancy will be issued until the appropriate discretionary processes associated with the use of firearms in city limits and determination of use for the vocational/trade school by the Planning Commission has been completed. Since [the] Planning Commission and City[] Council's actions will be considered discretionary, these actions are subject to review under the California Environmental Quality Act (CEQA)."

53. Mr. Broughton's letter asserted that Blackwater may continue to use the Otay Mesa facility as a warehouse. A copy of Mr. Broughton's May 19, 2008 letter to Mr. Bonfiglio is attached as Exhibit D.

54. As detailed above, target ranges are not subject to discretionary council approvals. As detailed above, vocational facilities are not subject to discretionary planning commission review (or the concomitant CEQA analysis).

55. Fearing Blackwater's May 19, 2008 letter may have crossed with Mr. Broughton's May 19, 2008 and not been reviewed, Blackwater sent another letter to Defendant Broughton on May 20, 2008. A copy of the May 20, 2008 letter is attached as Exhibit E. Despite Blackwater's request, the City still refuses to send Blackwater its Certificate of Occupancy.

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FIRST CLAIM FOR RELIEF
Injunctive Relief Mandate Against All Defendants

56. Blackwater realleges and incorporates by reference paragraphs 1 through 55 hereof as if set forth herein in full.

57. As Defendant Broughton has admitted, Blackwater has complied with the Municipal Code and the California Building Code. As a result, all permits were properly issued and Blackwater was correctly given the right to occupy the site, and Blackwater has vested rights in the Otay Mesa Facility. Defendants have a clear and present ministerial duty to send to Blackwater its Certificate of Occupancy for the Otay Mesa training facility, which has already been approved by the Building Official.

58. Blackwater has a clear and present right to occupy the Otay Mesa facility and therefore a right to the performance of Defendants' ministerial duty of sending the Certificate of Occupancy. See SDMC § 129.0114.

59. Blackwater does not have a plain, speedy, and adequate remedy in the ordinary course of law because Blackwater must have the training facility operational by June 2, 2008.

60. To remedy Defendants' improper acts and avoid irreparable harm, Blackwater seeks injunctive relief ordering Defendants to send to Blackwater its Certificate of Occupancy. Alternatively, Blackwater seeks an order staying the effectiveness of the Defendant Broughton's May 19, 2008 letter to Brian Bonfiglio and allowing Blackwater to immediately occupy the Otay Mesa Facility. Moreover, Blackwater seeks an order enjoining Defendants from (1) enforcing the May 19, 2008 letter from Kelly Broughton purportedly refusing to issue its Certificate of Occupancy for the Otay Mesa Facility and/or refusing to allow Blackwater to immediately occupy the Otay Mesa Facility, and (2) refusing to perform the ministerial task of sending Blackwater a Certificate of Occupancy for the Otay Mesa Facility.

SECOND CLAIM FOR RELIEF
Declaratory Judgment against All Defendants

61. Blackwater realleges and incorporates by reference paragraphs 1 through 60 hereof as if set forth herein in full.

62. An actual controversy has arisen and now exists between Blackwater and Defendants relating to their respective rights and duties in that Blackwater contends that Defendants' withholding of Blackwater's Certificate of Occupancy is invalid and unenforceable. Instead, the City is legally required to perform the ministerial act of sending Blackwater the Certificate of Occupancy. See SDMC § 129.0114. Defendants dispute these contentions and contend that their withholding of Blackwater's Certificate of Occupancy is valid.

63. Pursuant to 28 U.S.C. § 2201, Blackwater desires a declaration that (1) the Defendants' purported withholding of Blackwater's Certificate of Occupancy is improper, unlawful and invalid and (2) Blackwater has the right to occupy the building.

64. Such a declaration is necessary and appropriate at this time under the circumstances in order that Blackwater and Defendants may ascertain their respective rights and duties, and for Blackwater to avoid irreparable harm.

THIRD CLAIM FOR RELIEF
Violation of Section 1983 (Procedural Due Process) against All Defendants

65. Blackwater realleges and incorporates by reference paragraphs 1 through 64 hereof as if set forth herein in full.

66. At all times relevant herein, all Defendants' conduct was subject to 42 U.S.C. § 1983.

67. Blackwater obtained all necessary Building Permits and approvals to occupy the building so it could operate its training program at the Otay Mesa facility. The Building Official indicated that Blackwater was approved for a Certificate of Occupancy by stamping Blackwater's building plans with a

Certificate of Occupancy stamp. Accordingly, Blackwater possesses a protected property right in its building permits and the approval to occupy the building.

68. On May 19, 2008, Defendants, acting under color of state law and pursuant to the City Attorney's flawed analysis, purported to deprive Blackwater of its protected property rights by sending a letter to Brian Bonfiglio, Blackwater's Vice President, stating that "[t]he City will not issue a certificate of occupancy for the [Otay Mesa facility] pursuant to Section 129.0114 of the San Diego Municipal Code…" This letter prohibits Blackwater from using the Otay Mesa facility for any purpose other than "warehouse uses." Accordingly, Blackwater cannot operate its training program or begin classes on June 2, 2008, as it must do to satisfy the United States Navy's requirements.

69. Defendants provided Blackwater no notice and opportunity to be heard before depriving Blackwater of its property rights. Moreover, any post-deprivation hearing that Blackwater might be entitled to would be completely ineffective because nothing would be resolved prior to June 2, 2008. Accordingly, Defendants have violated Blackwater's constitutional right to procedural due process.

70. Because Defendants are improperly withholding Blackwater's Certificate of Occupancy, Blackwater stands to suffer reputational harm and could lose all or a portion of its contract with the United States Navy for the training of sailors. Blackwater may also incur expenses related to the Otay Mesa facility, such as rent, and utility bills, even though the company cannot use it for its training program. Blackwater also may be contractually obligated to pay its instructors, vendors, and landlord for services and goods that it will not be able to use because of this revocation.

71. To remedy this constitutional violation and avoid irreparable harm, Blackwater seeks to recover from Defendants, pursuant to 42 U.S.C. § 1983, appropriate declaratory and injunctive relief as well as its damages, together with interest, and its costs and attorneys' fees in bringing this lawsuit.

FOURTH CLAIM FOR RELIEF
Violation of Section 1983 (Equal Protection) against All Defendants

72. Blackwater realleges and incorporates by reference paragraphs 1 through 71 hereof as if set forth herein in full.

73. At all times relevant herein, all Defendants' conduct was subject to 42 U.S.C. § 1983.

74. Blackwater intends to use the Otay Mesa facility to operate a training program for sailors. This training program would include training on marksmanship using the target range that Blackwater has built inside the warehouse. By withholding Blackwater's Certificate of Occupancy, Defendants, based on the City Attorney's flawed analysis, have prevented Blackwater from using the Otay Mesa facility to operate its Navy training program.

75. However, the City permits Southwestern College to operate a P.O.S.T-certified police academy in the Otay Mesa area, at 8100 Gigantic Street, less than a quarter mile from Blackwater's Otay Mesa facility. On information and belief, the City did not require Southwestern College or other vocational institutions, including privately-run institutions, to obtain any special approval from the City Council to operate as a vocational institution, such as the process being imposed on Blackwater. Moreover, on information and belief, other target ranges in the area were not required to pursue the City's proposed "discretionary process"—and were not subjected to CEQA's requirements—as is being required of Blackwater. *See* Exhibit C.

76. Defendants have not articulated any rational basis for its disparate treatment of Blackwater, on the one hand, and Southwestern College and other target ranges or vocational institutions, on the other hand. Indeed, Defendants' withholding of Blackwater's Certificate of Occupancy violates the City's own Municipal Code.

77. Instead of being motivated by any rational basis, Defendants' actions are motivated by political pressure. The existence of Blackwater's facility in Otay Mesa has become an issue in the campaign for re-election of both the San Diego City Attorney and the Mayor of San Diego. Thus, Defendants' actions are motivated not by a legitimate state interest, but by the City Attorney's and the Mayor's desire to win their re-election campaigns.

78. Accordingly, Defendants have violated Blackwater's constitutional right to equal protection.

79. To remedy this constitutional violation and avoid irreparable harm, Blackwater seeks to recover from Defendants, pursuant to 42 U.S.C. § 1983, appropriate declaratory and injunctive relief, as well as its damages, together with interest, and its costs and attorneys' fees in bringing this lawsuit.

FIFTH CLAIM FOR RELIEF
Violation of Dormant Commerce Clause against All Defendants

80. Blackwater realleges and incorporates by reference paragraphs 1 through 79 hereof as if set forth herein in full.

81. At all times relevant herein, all Defendants' conduct was subject to Article I, § 8, cl. 3 of the United State Constitution.

82. "The Commerce Clause empowers Congress '[t]o regulate Commerce . . . among the several States,' Art. I, §8, cl. 3, and although its terms do not expressly restrain 'the several States' in any way, we have sensed a negative implication in the provision since the early days, see, e.g., *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318–319 (1852); cf. *Gibbons v. Ogden*, 9 Wheat. 1, 209 (1824) (Marshall, C. J.) (dictum). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by

burdening out-of-state competitors." *Kentucky v. Davis*, -- S.Ct. --, 2008 WL 2078187 (U.S., May 19, 2008) (citation and internal quotes omitted).

83. The dormant Commerce Clause requires any justifications for favoring in-state business over out-of-state competitors to satisfy "strict scrutiny."

84. Blackwater intends to use the Otay Mesa facility to operate a training program for sailors. This training program would include training on marksmanship using the target range that Blackwater has built inside the warehouse. By withholding Blackwater's Certificate of Occupancy, Defendants have prevented Blackwater from using the Otay Mesa facility to operate its training program.

85. However, the City permits Southwestern College to operate a P.O.S.T-certified police academy in the Otay Mesa area, at 8100 Gigantic Street, less than a quarter mile from Blackwater's Otay Mesa facility. On information and belief, the City did not require Southwestern College or other vocational institutions, including privately-run institutions, to obtain any special approval from the City Council to operate as a vocational institution, such as the process being imposed on Blackwater. Moreover, on information and belief, other target ranges in the area were not required to pursue the City's proposed "discretionary process"—and were not subjected to CEQA's requirements—as is being required of Blackwater. *See* Exhibit C.

86. Defendants have not articulated any proper basis for their disparate treatment of Blackwater. The City's withholding of Blackwater's Certificate of Occupancy for political motives is a discriminatory act absent a showing that there is no other means to advance a legitimate local purpose.

87. Defendants have imposed on Blackwater regulatory measures in a manner designed to benefit in-state economic interests by burdening out-of-state competitors.

88. Withholding issuance of Blackwater's Certificate of Occupancy when similar certificates have been routinely issued for in-state companies does not pass strict scrutiny because it unduly burdens the interstate market and impermissibly causes a shift of business from out-of-state firms to in-state firms.

89. To remedy this constitutional violation and avoid irreparable harm, Blackwater seeks to recover from Defendants, pursuant to U.S. Const., art I, § 8, cl. 3, appropriate declaratory and injunctive relief.

SIXTH CLAIM FOR RELIEF
Violation of Cal. Const., art I, § 7(a) (Procedural Due Process)
against All Defendants

90. Blackwater realleges and incorporates by reference paragraphs 1 through 89 hereof as if set forth herein in full.

91. At all times relevant herein, all Defendants' conduct was subject to Cal. Const., art I, § 7(a).

92. Blackwater obtained all necessary building permits and approval to occupy the building so it could operate its training program at the Otay Mesa facility. The Building Official indicated that Blackwater was approved for a Certificate of Occupancy by stamping Blackwater's building plans with a Certificate of Occupancy stamp. Accordingly, Blackwater possesses a protected property right in its building permits and the approval to occupy the building.

93. On May 19, 2008, Defendants, acting under color of state law and based on the City Attorney's flawed analysis, purported to deprive Blackwater of its protected property rights by sending a letter to Brian Bonfiglio, Blackwater's Vice President, stating that "[t]he City will not issue a certificate of occupancy for the [Otay Mesa facility] pursuant to Section 129.0114 of the San Diego Municipal Code..." This letter prohibits Blackwater from using the Otay Mesa facility for any purpose other than "warehouse uses." Accordingly, Blackwater cannot operate its

training program or begin classes on June 2, 2008, as it must do to satisfy the United States Navy's requirements.

94. Defendants provided Blackwater no notice and opportunity to be heard before depriving Blackwater of its property rights. Any post-deprivation hearing that Blackwater might be entitled to would be completely ineffective because nothing would be resolved prior to June 2, 2008. Accordingly, Defendant has violated Blackwater's constitutional right to procedural due process.

95. Because Defendants are improperly withholding Blackwater's Certificate of Occupancy, Blackwater stands to suffer reputational harm and could lose all or a portion of its contract with the United States Navy for the training of sailors. Blackwater may also incur expenses related to the Otay Mesa facility, such as rent, and utility bills, even though the company cannot use it for its training program. Blackwater also may be contractually obligated to pay its instructors, vendors, and landlord for services and goods that it will not be able to use because of this revocation.

96. To remedy this constitutional violation and avoid irreparably harm, Blackwater seeks to recover from Defendants, pursuant to Cal. Const., art I, § 7(a), appropriate declaratory and injunctive relief.

SEVENTH CLAIM FOR RELIEF
Violation of Cal. Const., art I, § 7(a) (Equal Protection) against All Defendants

97. Blackwater realleges and incorporates by reference paragraphs 1 through 96 hereof as if set forth herein in full.

98. At all times relevant herein, all Defendant's conduct was subject to Cal. Const., art I, § 7(a).

99. Blackwater intends to use the Otay Mesa facility to operate a training program for sailors. This training program would include training on marksmanship using the target range that Blackwater has built inside the warehouse. By withholding Blackwater's Certificate of Occupancy, Defendants

have prevented Blackwater from using the Otay Mesa facility to operate its training program.

100. However, the City permits Southwestern College to operate a P.O.S.T-certified police academy in the Otay Mesa area, at 8100 Gigantic Street, less than a quarter mile from Blackwater's Otay Mesa facility. On information and belief, the City did not require Southwestern College or other vocational institutions, including privately-run institutions, to obtain any special approval from the City Council to operate as a vocational institution, such as the process being imposed on Blackwater. Moreover, on information and belief, other target ranges in the area were not required to pursue the City's proposed "discretionary process"—and were not subjected to CEQA's requirements—as is being required of Blackwater. *See* Exhibit C.

101. Defendants have not articulated any rational basis for its disparate treatment of Blackwater, on the one hand, and Southwestern College and other target ranges or vocational institutions, on the other hand. Indeed, Defendants' withholding of Blackwater's Certificate of Occupancy violates the City's own Municipal Code.

102. Instead of being motivated by any rational basis, Defendants' actions are motivated by political pressure. The existence of Blackwater's facility in Otay Mesa has become an issue in the campaign for re-election of both the San Diego City Attorney and the Mayor of San Diego. Thus, Defendants' actions are motivated not by a legitimate state interest, but by the City Attorney's and the Mayor's desire to win their re-election campaigns.

103. Accordingly, Defendants have violated Blackwater's constitutional right to equal protection.

104. To remedy this constitutional violation, Blackwater seeks to recover from Defendants, pursuant to Cal. Const., art I, § 7(a), appropriate declaratory and injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Blackwater prays for:

1. A preliminary and permanent injunction requiring Defendants to complete the ministerial function of sending Blackwater the Certificate of Occupancy or, alternatively, order staying the effectiveness of the City's May 19, 2008 letter to Brian Bonfiglio and allowing Blackwater to immediately occupy the Otay Mesa Facility;
2. A preliminary and permanent injunction enjoining Defendants from (1) enforcing the May 19, 2008 letter from Kelly Broughton purportedly refusing to issue its Certificate of Occupancy for the Otay Mesa Facility and/or refusing to allow Blackwater to immediately occupy the Otay Mesa Facility, and (2) refusing to perform the ministerial task of sending Blackwater a Certificate of Occupancy for the Otay Mesa Facility;
3. A judgment declaring that (1) Defendants Broughton's, the Department's and the City' purported withholding of Blackwater's Certificate of Occupancy is improper, unlawful and invalid and (2) Blackwater has the right to occupy the building;
4. A judgment awarding Blackwater all damages it incurred, together with interest;
5. A judgment awarding Blackwater its costs and attorneys' fees; and
6. Such other and further relief as this Court deems just and proper.

Dated: May 21, 2008

MAYER BROWN LLP

By: [signature]
John Nadolenco
Attorneys for Plaintiff
BLACKWATER LODGE AND TRAINING CENTER, INC., dba BLACKWATER WORLDWIDE

JURY DEMAND

Plaintiff hereby demand trial by jury of all issues so triable.

Dated: May 21, 2008

MAYER BROWN LLP

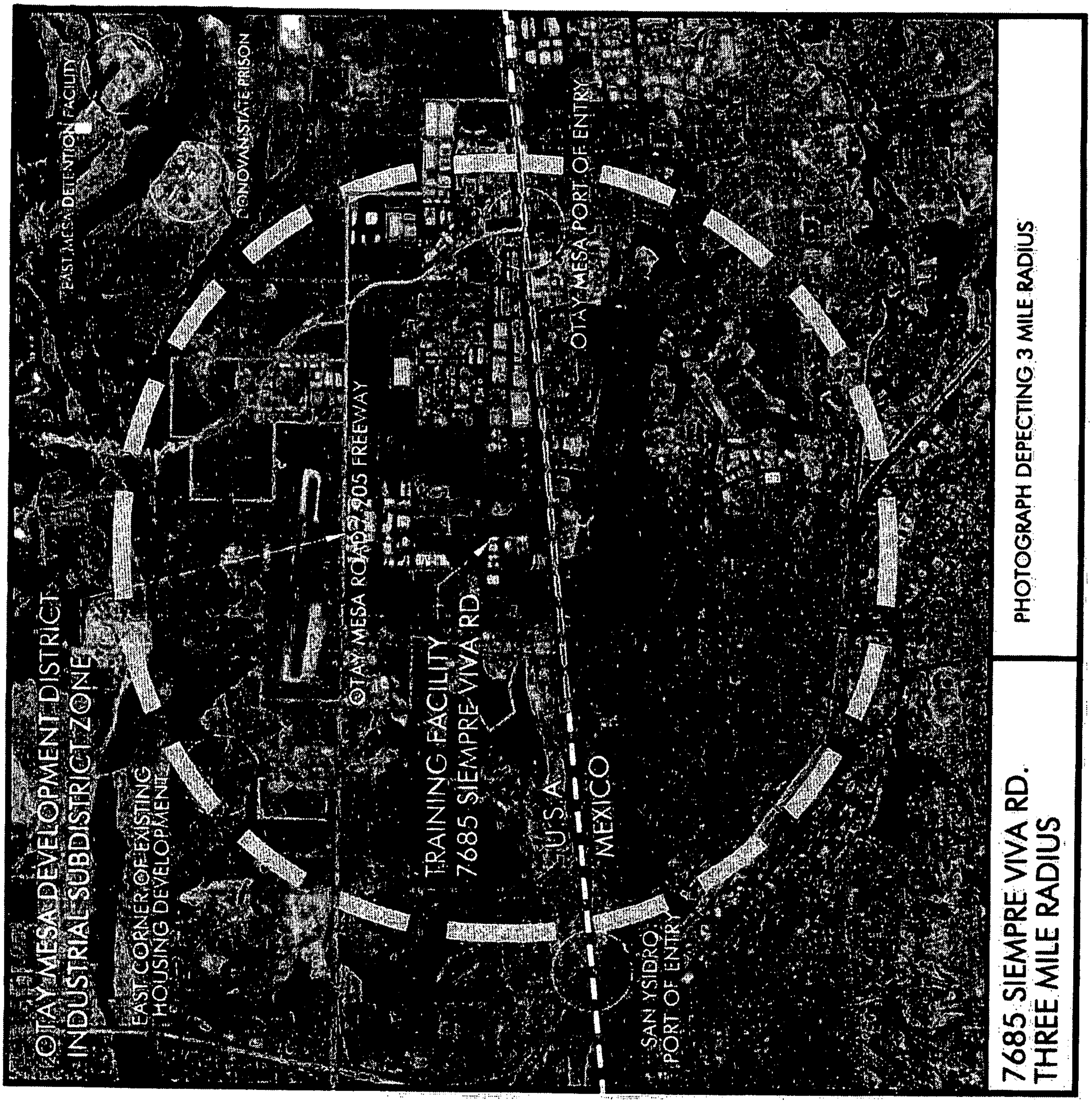
By: [signature]

John Nadolenco

Attorneys for Plaintiff
BLACKWATER LODGE AND TRAINING CENTER, INC., dba BLACKWATER WORLDWIDE

EXHIBIT A

EXHIBIT A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INDUSTRIAL SUBDISTRICT ZONE
EAST CORNER OF EXISTING
HOUSING DEVELOPMENT
EAST MESA DETENTION FACILITY
DONOVAN STATE PRISON
OTAY MESA ROAD / 905 FREEWAY
TRAINING FACILITY
7685 SIEMPRE VIVA RD.
U.S.A.
MEXICO
OTAY MESA PORT OF ENTRY
SAN YSIDRO
PORT OF ENTRY
7685 SIEMPRE VIVA RD.
THREE MILE RADIUS
PHOTOGRAPH DEPECTING 3 MILE RADIUS

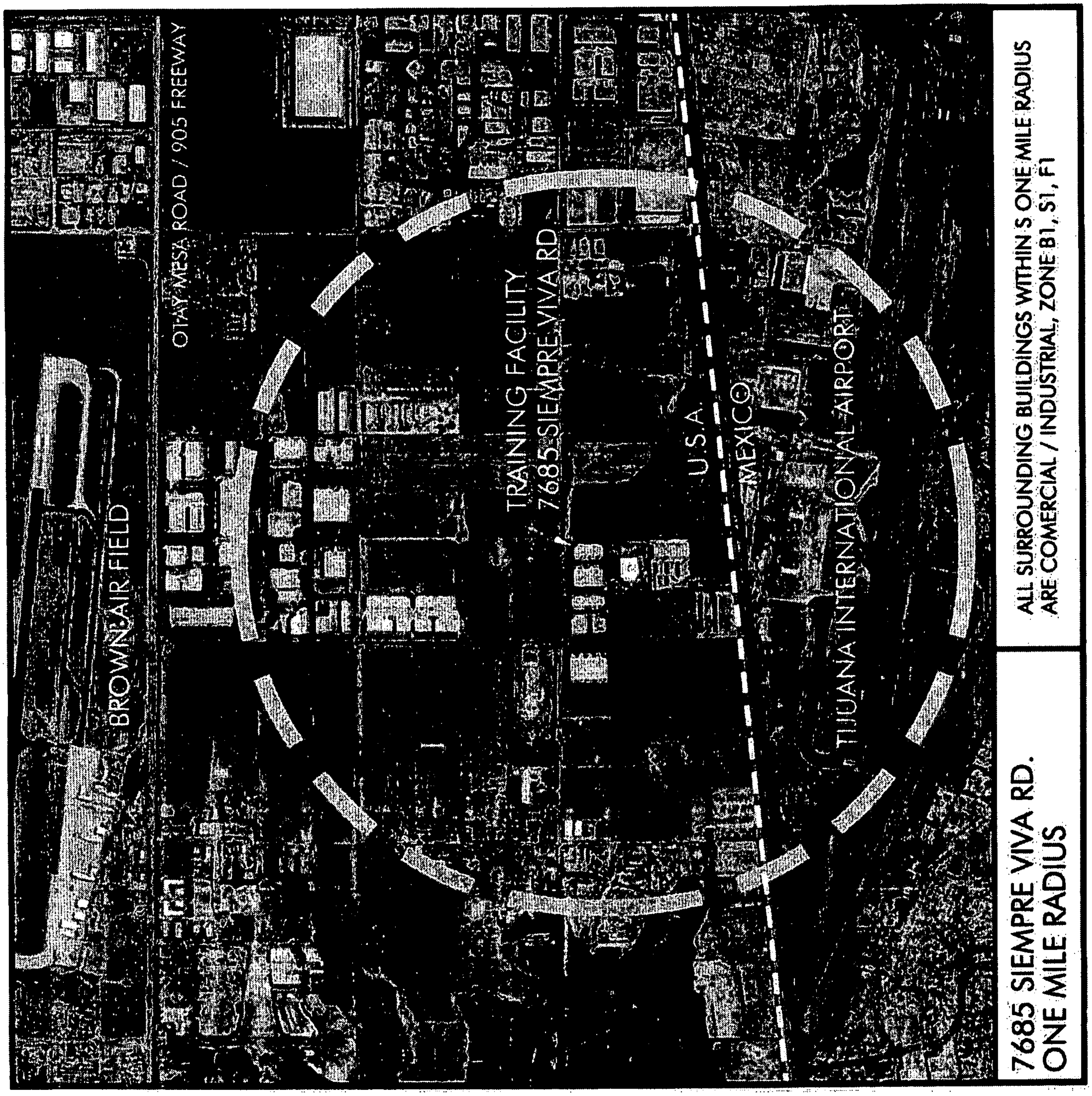
7685 SIEMPRE VIVA RD.
ONE MILE RADIUS
ALL SURROUNDING BUILDINGS WITHIN S ONE MILE RADIUS
ARE COMERCIAL / INDUSTRIAL, ZONE B1, S1, F1
BROWN AIR FIELD
OTAY MESA ROAD / 905 FREEWAY
TRAINING FACILITY
7685 SIEMPRE VIVA RD
U.S.A.
MEXICO
TIJUANA INTERNATIONAL AIRPORT

EXHIBIT B

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: May 16, 2008

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: 7685 Siempre Viva Road, Blackwater Law Enforcement/Security Operations in Otay Mesa

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INTRODUCTION

On or about May 5, 2008, Mayor Sanders requested an investigation concerning the issuance of permits by the City for the use and construction of a training facility operated at 7685 Siempre Viva Road, in Otay Mesa, by an entity commonly known as Blackwater. On May 1, 2008, the Honorable Congressman Bob Filner requested a similar investigation. In response to these requests, the City Attorney's office conducted a legal analysis of the process used to issue the permits and the mechanisms available to Blackwater for compliance with the law.

BACKGROUND

On or about September 5, 2007, an entity operating under the project name "Southwest Law Enforcement Training Enterprise," filed a general application with the City of San Diego's Development Services Department [DSD] to conduct "Tenant Improvements" at 7685 Siempre Viva Road located within the Otay Mesa Development District. The existing use identified on the application was warehouse with offices. The proposed use identified on the application was identified as "same (no change)." The purpose of the application was to construct 44 feet of new partitions in existing office space. Accompanying the application was a signed Hazardous Materials Questionnaire where the applicant disclosed that there were no uses of explosives or blasting agents or other health hazards associated with the activity.

On or about February 7, 2008, another general application was submitted to the City of San Diego's DSD to conduct electrical work at the 7685 Siempre Viva Road site for a project entitled

"South West Police." The scope of the work included the installation of two new AC units and six exhaust fans.

On or about February 7, 2008, a separate General Application was also submitted to DSD for structural work for this same site. The project description on the application was to "[a]dd [an] indoor firing range." The identified proposed use on the application was for a training facility. The existing use was identified on the application as warehouse use and the project title was now "Southwest Law Enforcement." The Lessee or Tenant was identified on this application as "Raven Development Group" with an address in North Carolina. However, the September 5, 2007 application had identified the Lessee or Tenant as "Southwest Law Enforcement Training Enterprises" with an address in San Diego. The Hazardous Materials Questionnaire dated February 7, 2008 for the construction of the firing range did not identify any uses of explosives or blasting agents or other health hazards associated with this operation.

QUESTIONS PRESENTED

1. May the project applicant operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District with only ministerial processing and approvals?

2. What processes and approvals must be followed in order for the project applicant to operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District?

SHORT ANSWERS

1. No. The project applicant may not operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District with only ministerial processing and approvals.

2. The project applicant may operate such a facility within an Industrial Subdistrict of the Otay Mesa Development District after the City has complied with the requirements of the California Environmental Quality Act [CEQA] and after the City of San Diego's Planning Commission through a Process Four Hearing has authorized such use, pursuant to Section 1517.0301(c)(2) of the San Diego Municipal Code [SDMC]. However, if the project applicant intends to use firearms as part of the training conducted at this same training facility, the project applicant should also obtain permission from the City Council pursuant to SDMC Section 53.10(e) and (f). Furthermore, to be consistent with the purpose and intent of SDMC Section 112.0103, the highest decisionmaking body should hear all discretionary actions together; therefore, both the underlying approval of the use of the site for a law enforcement/security training facility should be made by the City Council in conjunction with the decision to allow the use of firearms on-site.

ANALYSIS

The legal authority of the City of San Diego to regulate the use of land for training facilities and firearm use falls squarely within the City's police powers. Exercising this authority, the City of San Diego strictly limits how and when firearms may be used within the City. Specifically, Section 53.10(a) states, "It is the purpose and intent of the Council of the City of San Diego that the firing of firearms and other explosives within the city limits be strictly regulated for the protection of all persons and property located in the City." With the exception of shooting galleries or target ranges (note: this exception does not include vocational or trade schools) and government authorized use, no firing of firearms is allowed without City Council approval by resolution. *See* SDMC Section 53.10(d) and (e). Approval by City Council is a discretionary act and will trigger the need to comply with CEQA. In addition, as explained in more detail below, the underlying zone and use restrictions may also limit where shooting ranges may be allowed.

7685 Siempre Viva Road is located in the IH-2-1 zone of the Otay Mesa Industrial Subdistrict within the Otay Mesa Development District. As stated in SDMC Section 131.0604(a), the purpose of the IH (Industrial—Heavy) zone

> is to provide space for land-intensive industrial activities emphasizing base-sector manufacturing. The IH zones are intended to promote efficient industrial land use with minimal development standards, while providing proper safeguards for adjoining properties and the community in general. It is the intent of these zones to limit the presence of nonindustrial uses in order to preserve land that is appropriate for large-scale industrial users.

The IH-1-1 zone allows primarily manufacturing uses and the IH-2-1 zone allows manufacturing uses with some office use. *See* SDMC Section 131.0604(b). Neither a shooting range nor a law enforcement/security training operation clearly qualify or fall within any of the permitted uses of the IH-1-1 or IH-2-1 zones. Table 131.06B of Section 131.0622, however, does permit vocational/trade schools in the IH-2-1 zone and SDMC Section 1517.0301(a)(1) cross-references Table 131.06B as applicable within the Otay Mesa Industrial Subdistrict. However, as of the date of this memo, no available information indicates clearly that the law enforcement/security training facility, as proposed by the applicant, would qualify as a vocational or trade school. In addition, SDMC Section 1517.0301(a)(8)(A) further restricts trade schools within the Otay Mesa Industrial Subdistrict to those "trade schools instructing in subjects related to a use permitted within the Industrial Subdistrict." However, SDMC Section 1517.0301(c)(1) and (2) states other uses not otherwise identified are permitted under the following circumstances:

> (1) Accessory uses for any of the foregoing permitted uses including signs. As specified in Land Development Code Chapter 14, Article 2, Division 12 (Sign Regulations), for sign

> regulatory purposes this Otay Mesa Development District shall be deemed to be an industrial zone.[1]
>
> (2) Any other uses which the Planning Commission finds, in accordance with Process Four, to be similar in character to the uses enumerated in the Otay Mesa Development District Ordinance and which are clearly within the intent and purpose of the Otay Mesa Development District. The adopted resolution embodying any such finding shall be filed in the office of the City Clerk.

Given the type of operation proposed, Planning Commission approval pursuant to Section 1517.0301(c)(2) is appropriate here.[2] Planning Commission review is a discretionary act and will trigger the requirements of CEQA.[3]

Since the use of firearms at the site will trigger City Council approval, it would be appropriate under these circumstances for the City Council to determine the whole of the action; namely, whether to authorize the use of 7685 Siempre Viva Road as a law enforcement/security training facility where firearms will be used. This would be consistent with SDMC Section 112.0103.[4]

With respect to the CEQA analysis, at a minimum, potential environmental impacts should be analyzed, including noise impacts, potential for discharges into the storm drain, accidental explosion or release of hazardous substances (e.g., lead discharge), fire hazards and impacts on fire protection services, other safety concerns due to the firing of guns and potential adverse effects due to traffic, such as traffic congestion. To the extent these impacts are determined to be significant, then they should be mitigated and the mitigation documented in a Mitigated Negative Declaration. Mitigation may include, but is not limited to, the following:

- The facility be constructed with impenetrable walls, adequate ventilation and lighting systems for a shooting range, and acoustical treatment for sound attenuation suitable for a firing range;

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[1] The training facility does not fall into the category of "accessory use" as defined in Section 113.0103.

[2] SDMC Section 131.0110(a) gives some discretion to the City Manager to determine the appropriate use category; however, this discretion does not authorize arbitrary determinations. In fact, SDMC Section 131.0110(c) allows for an amendment to the Use Regulations Table where a use category or subcategory cannot be determined. Any amendment will require City Council approval. Planning Commission review under Section 1517.0301(c)(2) provides another means for determining appropriate use, in order to avoid the problem of having to fit a square peg into a round hole.

[3] Even if this operation were only characterized as a shooting range and not a training facility, a shooting range is not a use authorized within this zone and would also trigger the need for Planning Commission review, regardless of the applicability of SDMC Section 53.10. *See also* SDMC Sections 131.0620(a), 131.0630(a) and 1517.0301(a).

[4] SDMC Section 112.0103 states: "When an applicant applies for more than one permit, map, or other approval for a single development, the applications shall be consolidated for processing and shall be reviewed by a single decision maker. The decision maker shall act on the consolidated application at the highest level of authority for that development as set forth in Section 111.1015. The findings required for approval of each permit shall be considered individually, consistent with Section 126.0105."

- The facility be operated in a manner that minimizes the possibility of a release of hazardous waste and/or hazardous waste constituents (e.g., fine powders of range lead); The facility collect, manage, and dispose of all unreacted gun powders and residues properly as hazardous waste;

- The facility label each container of hazardous waste generated on-site; and,

- The facility complete a Hazardous Waste Manifest for all hazardous wastes generated on-site, and use a registered hazardous waste transporter to transport hazardous wastes off-site to an authorized facility.

CONCLUSION

Because construction permits and other approvals were issued before discretionary approval of the underlying use had been obtained, a stop work order should be issued. The applicant should be required to submit a new application for discretionary approval in order to use the site as a law enforcement/security training facility where firearms will be used.[5] In addition, no Certificate of Occupancy under SDMC Section 129.0114 should be issued until all discretionary approvals have been obtained, including compliance with CEQA. If a Certificate of Occupancy has already been issued in error, then proceedings to suspend or revoke the Certificate should be initiated pursuant to SDMC Section 129.0118. This Office is open to considering additional information or facts as they become known; at such time, additional legal analysis may be appropriate.

MICHAEL J. AGUIRRE,
City Attorney

MJA:SRE:pev

[5] SDMC Section 129.0108 states, "After all required approvals, including any required *development permits*, have been obtained and all required fees have been paid, the Building Official may issue a *construction permit*. Construction shall not begin until the required permits have been issued." Section 129.0105(a) further states, "If a proposed *development* requires one or more *development permits*, the required *development permits* must be issued before an application is submitted for a *construction permit* except as provided in Section 129.0105(c)."

EXHIBIT C

EXHIBIT C

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May 19, 2008

Mayor Jerry Sanders
City Administration Building
11th Floor, 202 C Street
San Diego, CA 92101

Dear Mayor Sanders:

This past Friday, City Attorney Aguirre issued a memorandum to the Mayor and Members of the City Council. The memo, which indicates that it was prepared in response to your request for an investigation, purports to analyze certain legal issues relevant to the permitting of the training facility to be operated by our client, Blackwater Worldwide, in Otay Mesa. Based on that analysis, which proceeds on incorrect factual assumptions and reaches faulty legal conclusions, the memorandum recommends that action be taken to prevent the facility from operating.

Certain media reports discussing the City Attorney's memorandum also indicated that, in apparent reliance on the City Attorney's memorandum, the City may be considering imminent action with respect to facility and its permits. To our understanding, your administration has been conducting its own review of the permitting process with respect to the Otay Mesa facility, with an initial report on the matter not due until May 23. As such, it may well be the case that the media reports of imminent action on your administration's behalf, be it in reliance on the City Attorney's memorandum or otherwise, are inaccurate.

To the extent your administration is considering such action, and particularly to the extent your administration is relying on the City Attorney's memorandum, we felt it important to apprise you and your administration of the correct facts and proper legal analysis. In doing so, we hope to prevent action taken in error that might irreparably harm Blackwater.[1]

[1] Although the City Attorney did not contact Blackwater for information pertaining to its permits, the memorandum's concludes by stating that the "Office is open to considering additional information or facts as they become known; at such time, additional legal analysis may be appropriate." Given the City Attorney's apparent willingness to consider additional information, we are copying the City Attorney on this letter.

Mayer Brown LLP operates in combination with our associated English limited liability partnership and Hong Kong partnership (and its associated entities in Asia).

For starters, the memorandum states that because Blackwater will train members of the U. S. Navy on the proper use of firearms at the facility, the San Diego Municipal Code (SDMC) requires a special approval by the city council. This is incorrect.

SDMC section 53.10 governs the discharge of firearms within the city. As the memorandum noted, section 53.10 generally prohibits the use of firearms and allows the city council to issue permits for the same under "conditions as it deems proper." However, SDMC section 53.10(d) clearly permits the discharge of firearms, without discretionary council approval or CEQA review, if the firearms are discharged at a facility instructing on the proper use of firearms and allowing individuals to engage in target practice. Such facilities are called "target ranges."[2] Section 53.10(d) reads: **"Exceptions: This section does not apply to . . . target ranges."**

By exempting from special approval processes the places where San Diegans (and in this case, the men and women of the U.S. Navy) may practice gun safety and gun accuracy, the Municipal Code is consistent with the public policy of the State of California, which similarly exempts target ranges from even the strictest of gun laws. *See* Cal. Pen. Code § 12026.2(a)(9) (exempting people traveling to target ranges from California's concealed weapon ban); Cal. Pen. Code § 12027(f) (exempting members of target ranges, whether public or private, from other concealed weapons restrictions); Cal. Pen. Code § 12031(b)(5) (exempting individuals at target ranges from being charged with felony for carrying a loaded weapon); Cal. Pen. Code § 12070(b)(9) (exempting target ranges that loan guns to individuals from California gun-transfer laws); Cal. Pen. Code § 12073(b)(7) (exempting target ranges from certain recordkeeping requirements); Cal. Pen. Code § 12280(k)(1)(C)(i) (exempting target ranges from California assault weapons ban); Cal. Pen. Code § 12285(c)(3) (exempting individuals at target ranges from certain assault weapon registration requirements); and Cal. Civ. Code § 3482.1 (exempting compliant shooting ranges from nuisance liability).

Taken together, these provisions, along with SDMC section 53.10(d), make very clear that it is the policy of the State of California and the City of San Diego to exempt target ranges from even the most onerous of gun restrictions, to encourage learning about the safe operation of firearms. Consequently, it is inaccurate to claim that the target range component of Blackwater's training facility will require council approval or CEQA review.

The memorandum also states that a law enforcement or security training operation does not "clearly qualify" as a permitted use in Otay Mesa.[3] This again is incorrect, as vocational facilities are permitted in Otay Mesa, as a matter of right, under two distinct provisions of the Municipal Code. SDMC section 1517.0301(a)(1) specifically authorizes "All uses permitted in the IH-2-1 zone." It further exempts facilities permitted in the IH-2-1 zone from obtaining any special permits, including an Otay Mesa Development Permit. Vocational schools are permitted in the IH-2-1 zone, under SDMC section 131.0622, Table 131-06B. Thus, because Blackwater's facility, a vocational school, would be permitted in the IH-2-1 zone as a matter of right, it is similarly permissible, as a matter of right, in Otay Mesa.

---

[2] While the SDMC does not define "target range," the dictionary defines "target range" as "a practice range for target practice," a synonym for "firing range." *See* http://wordnet.princeton.edu/perl/webwn?s=target%20range (last accessed May 18, 2008).

[3] City Attorney Memorandum, page 3.

SDMC section 1517.0301(a)(8)(A) provides additional authority that a vocational school is permissible in Otay Mesa. That section allows a trade school to operate that instructs in subjects *related* to a use *permitted* in the Industrial Subdistrict. The Industrial Subdistrict allows for a wide variety of uses, including: (1) scientific research and development activities; (2) manufacturing plants requiring advance technology and skills; (3) facilities engaged in the production of experimental products; (4) general industrial uses (defined as "Establishments engaged in the . . . manufacturing . . . testing [or] servicing . . . of a wide range of products"); (4) storage warehouses; and (5) facilities involved in the wholesale distribution of various goods (including machinery, equipment, and supplies). *See* San Diego Municipal Code §§ 1517.0301(a)(2)(A), (2)(B), (2)(D), (3), (6)(A), (6)(B), *et seq.* Thus, if the subjects taught at Blackwater's vocational facility relate to *any* of these permissible uses, it is also permissible.

Blackwater's facility will instruct in a variety of subjects, all of which are related to permitted uses in the Otay Mesa Industrial Subdistrict. For example, Blackwater's facility will instruct on proper safety techniques for using the latest state-of-the-art personal weaponry. Because facilities engaged in researching and developing this weaponry are permitted in the subdistrict, a vocational school instructing end users on how to properly employ these devices would also be permissible. Blackwater's facility will also instruct students on how to assemble and disassemble firearms. Because facilities engaged in the manufacturing of firearms and firearm components are permitted in the subdistrict, a vocational school instructing individuals on how to assemble these items would also be permissible.

One final issue on this subject is worth discussing. The memorandum questions whether the Blackwater facility is indeed a "vocational school."[4] Yet, on page two, the memorandum recognizes that the facility will be a "law enforcement/security training facility." The facility will clearly be a "vocational school," as that term is commonly understood. While the San Diego Municipal Code does not define "vocational school," the dictionary defines it as "a school offering instruction in one or more skilled or semiskilled trades or occupations"[5] There should be no doubt that a facility offering specialized training to the men and women of the U.S. Navy would qualify as a vocational school. To state otherwise is to demean the occupational choice of the men and women who chose serving our country in the military as their occupation.[6]

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[4] *Id.*

[5] *See* http://dictionary.reference.com/browse/vocational%20school (last accessed May 18, 2008).

In sum, the Blackwater facility is clearly a vocational school. Vocational schools are permitted in Otay Mesa – as a matter of right with no need for discretionary or CEQA review – under two separate provisions of the Municipal Code. In fact, a P.O.S.T-certified[7] police academy is located on the campus of Southwestern College, at 8100 Gigantic Street in Otay Mesa, less than a quarter mile from Blackwater's facility. There can be no doubt that the Blackwater facility is properly located within Otay Mesa, and that the city's ministerial review process correctly resulted in the issuance of permits for the facility.[8]

Blackwater Worldwide is keenly aware that this is an election year, but asks that politics stay out of the permitting process. Blackwater has been completely forthcoming with every city inspector and every city official. Just three weeks ago, on April 29, we met with the Chief Building Official, Afsaneh Ahmadi, at the Development Services headquarters. At that meeting, Ms. Ahmadi closely reviewed all of Blackwater's plans and permit applications, and the next day, approved all permits. On May 12, Blackwater opened the facility to the city's Internal Auditor, an extraordinary step considering municipal finances have not been (and to our knowledge are not) an issue here.

Throughout the permitting process, Blackwater has collaborated with city officials to make sure it proceeded lawfully and openly. As a result, we know Blackwater's permits are proper, and we trust that with this letter, we have cleared up the factual or legal misconceptions concerning the facility contained in the City Attorney's memorandum. We also trust that no actions will be taken by your office or administration based on the City Attorney's memorandum.[9]

---

[6] As the memorandum also noted, the facility also has the capability to instruct members of law enforcement and those wanting a career in security. This should also remove any doubt that the facility is a vocational school, as surely law enforcement is a vocation; law-enforcement techniques are not typically taught at conventional universities.

[7] P.O.S.T. stands for Peace Officer Standards and Training. P.O.S.T. certification means a facility follows the standards and training courses outlined by the state of California for the training of peace officers.

[8] There also appears to be a misconception in the memorandum that a facility must be *either* a "target range" *or* a "vocational school." But those terms address different concepts in the statutory scheme. A "vocational facility" is a zoning "use." *See, e.g.*, SDMC section 131.0622. Other such permitted uses, for example, include universities or sports arenas, and others listed in the zoning ordinance. *See, e.g.*, SDMC §§ 131.0112(a), 131.0622. A "target range" on the other hand, is not a "use" and the code does not define it as such. Indeed, a "target range" is a component or feature of other uses, because a "target range" can be on the campus of a university, within a sports club, or part of the instruction taught at a vocational facility. Thus, a "vocational facility" can feature a "target range."

[9] We also note, at a minimum, before any action is taken on any of its permits, Blackwater would need to be provided formal notice of whatever "problems" allegedly were found, and an opportunity to be challenge those
(cont'd)

As the Navy itself has noted, Blackwater provides indispensable, "highly specialized" training of our "Sailors and Marines [when] no active duty personnel possess[] the requisite experience."[10] San Diego has a proud history of being a city very supportive of our men and women in the U.S. Navy, and there is no good reason for San Diego to deprive them of training at this critical time. Blackwater Worldwide knows it will make the community proud by offering this training, vital to national security, in the City of San Diego.

We would be happy to provide the city additional information as necessary. Please do not hesitate to contact me with any questions.

Very truly yours,

John Nadolenco
Mayer Brown LLP

cc: City Attorney Michael Aguirre

Chief Building Official Afsaneh Ahmadi

Members of the City Council

(... cont'd)

findings "at a meaningful time and in a meaningful manner." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 2649 (2004) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded." (internal quotes and citations omitted)).

[10] Letter from Rear Admiral M. Flanders to Ms. Barbara Simmons (Jul. 31, 2007).

EXHIBIT D

THE CITY OF SAN DIEGO

May 19, 2008

Mr. Brian Bonfiglio
Vice President
Blackwater Worldwide
PO Box 710897
San Diego, CA 92171-0897

Subject: 7685 Siempre Viva Road, Raven Development Group

Dear Mr. Bonfiglio,

The City will not issue a certificate of occupancy for the above referenced project pursuant to Section 129.0114 of the San Diego Municipal Code (SDMC). The portions of the building identified for use as a shooting range and vocational/trade school shall not be occupied until a certificate of occupancy has been issued for this change of use or occupancy pursuant to SDMC Section 129.0113.

As outlined in the attached opinion from the City Attorney's office, no certificate of occupancy will be issued until the appropriate discretionary processes associated with the use of firearms in city limits and determination of use for the vocational/trade school by the Planning Commission has been completed. Since Planning Commission and City's Council's actions will be considered discretionary, these actions are subject to review under the California Environmental Quality Act (CEQA).

As the majority of the structure is still identified for warehouse uses, no other uses are permitted until a submission for a request of change in occupancy has been made and approved by the Development Services Department.

Sincerely,

Kelly Broughton, Director
Development Services Department

Cc: Jay Goldstone, Chief Operating Officer
Michael J. Aguirre, City Attorney
William Anderson, Executive Director of City Planning and Development
Afsaneh Ahmadi, Chief Building Official

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: May 16, 2008

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: 7685 Siempre Viva Road, Blackwater Law Enforcement/Security Operations in Otay Mesa

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INTRODUCTION

On or about May 5, 2008, Mayor Sanders requested an investigation concerning the issuance of permits by the City for the use and construction of a training facility operated at 7685 Siempre Viva Road, in Otay Mesa, by an entity commonly known as Blackwater. On May 1, 2008, the Honorable Congressman Bob Filner requested a similar investigation. In response to these requests, the City Attorney's office conducted a legal analysis of the process used to issue the permits and the mechanisms available to Blackwater for compliance with the law.

BACKGROUND

On or about September 5, 2007, an entity operating under the project name "Southwest Law Enforcement Training Enterprise," filed a general application with the City of San Diego's Development Services Department [DSD] to conduct "Tenant Improvements" at 7685 Siempre Viva Road located within the Otay Mesa Development District. The existing use identified on the application was warehouse with offices. The proposed use identified on the application was identified as "same (no change)." The purpose of the application was to construct 44 feet of new partitions in existing office space. Accompanying the application was a signed Hazardous Materials Questionnaire where the applicant disclosed that there were no uses of explosives or blasting agents or other health hazards associated with the activity.

On or about February 7, 2008, another general application was submitted to the City of San Diego's DSD to conduct electrical work at the 7685 Siempre Viva Road site for a project entitled

"South West Police." The scope of the work included the installation of two new AC units and six exhaust fans.

On or about February 7, 2008, a separate General Application was also submitted to DSD for structural work for this same site. The project description on the application was to "[a]dd [an] indoor firing range." The identified proposed use on the application was for a training facility. The existing use was identified on the application as warehouse use and the project title was now "Southwest Law Enforcement." The Lessee or Tenant was identified on this application as "Raven Development Group" with an address in North Carolina. However, the September 5, 2007 application had identified the Lessee or Tenant as "Southwest Law Enforcement Training Enterprises" with an address in San Diego. The Hazardous Materials Questionnaire dated February 7, 2008 for the construction of the firing range did not identify any uses of explosives or blasting agents or other health hazards associated with this operation.

QUESTIONS PRESENTED

1. May the project applicant operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District with only ministerial processing and approvals?

2. What processes and approvals must be followed in order for the project applicant to operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District?

SHORT ANSWERS

1. No. The project applicant may not operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District with only ministerial processing and approvals.

2. The project applicant may operate such a facility within an Industrial Subdistrict of the Otay Mesa Development District after the City has complied with the requirements of the California Environmental Quality Act [CEQA] and after the City of San Diego's Planning Commission through a Process Four Hearing has authorized such use, pursuant to Section 1517.0301(c)(2) of the San Diego Municipal Code [SDMC]. However, if the project applicant intends to use firearms as part of the training conducted at this same training facility, the project applicant should also obtain permission from the City Council pursuant to SDMC Section 53.10(e) and (f). Furthermore, to be consistent with the purpose and intent of SDMC Section 112.0103, the highest decisionmaking body should hear all discretionary actions together; therefore, both the underlying approval of the use of the site for a law enforcement/security training facility should be made by the City Council in conjunction with the decision to allow the use of firearms on-site.

ANALYSIS

The legal authority of the City of San Diego to regulate the use of land for training facilities and firearm use falls squarely within the City's police powers. Exercising this authority, the City of San Diego strictly limits how and when firearms may be used within the City. Specifically, Section 53.10(a) states, "It is the purpose and intent of the Council of the City of San Diego that the firing of firearms and other explosives within the city limits be strictly regulated for the protection of all persons and property located in the City." With the exception of shooting galleries or target ranges (note: this exception does not include vocational or trade schools) and government authorized use, no firing of firearms is allowed without City Council approval by resolution. *See* SDMC Section 53.10(d) and (e). Approval by City Council is a discretionary act and will trigger the need to comply with CEQA. In addition, as explained in more detail below, the underlying zone and use restrictions may also limit where shooting ranges may be allowed.

7685 Siempre Viva Road is located in the IH-2-1 zone of the Otay Mesa Industrial Subdistrict within the Otay Mesa Development District. As stated in SDMC Section 131.0604(a), the purpose of the IH (Industrial—Heavy) zone

> is to provide space for land-intensive industrial activities emphasizing base-sector manufacturing. The IH zones are intended to promote efficient industrial land use with minimal development standards, while providing proper safeguards for adjoining properties and the community in general. It is the intent of these zones to limit the presence of nonindustrial uses in order to preserve land that is appropriate for large-scale industrial users.

The IH-1-1 zone allows primarily manufacturing uses and the IH-2-1 zone allows manufacturing uses with some office use. *See* SDMC Section 131.0604(b). Neither a shooting range nor a law enforcement/security training operation clearly qualify or fall within any of the permitted uses of the IH-1-1 or IH-2-1 zones. Table 131.06B of Section 131.0622, however, does permit vocational/trade schools in the IH-2-1 zone and SDMC Section 1517.0301(a)(1) cross-references Table 131.06B as applicable within the Otay Mesa Industrial Subdistrict. However, as of the date of this memo, no available information indicates clearly that the law enforcement/security training facility, as proposed by the applicant, would qualify as a vocational or trade school. In addition, SDMC Section 1517.0301(a)(8)(A) further restricts trade schools within the Otay Mesa Industrial Subdistrict to those "trade schools instructing in subjects related to a use permitted within the Industrial Subdistrict." However, SDMC Section 1517.0301(c)(1) and (2) states other uses not otherwise identified are permitted under the following circumstances:

> (1) Accessory uses for any of the foregoing permitted uses including signs. As specified in Land Development Code Chapter 14, Article 2, Division 12 (Sign Regulations), for sign

> regulatory purposes this Otay Mesa Development District shall be deemed to be an industrial zone.[1]
>
> (2) Any other uses which the Planning Commission finds, in accordance with Process Four, to be similar in character to the uses enumerated in the Otay Mesa Development District Ordinance and which are clearly within the intent and purpose of the Otay Mesa Development District. The adopted resolution embodying any such finding shall be filed in the office of the City Clerk.

Given the type of operation proposed, Planning Commission approval pursuant to Section 1517.0301(c)(2) is appropriate here.[2] Planning Commission review is a discretionary act and will trigger the requirements of CEQA.[3]

Since the use of firearms at the site will trigger City Council approval, it would be appropriate under these circumstances for the City Council to determine the whole of the action; namely, whether to authorize the use of 7685 Siempre Viva Road as a law enforcement/security training facility where firearms will be used. This would be consistent with SDMC Section 112.0103.[4]

With respect to the CEQA analysis, at a minimum, potential environmental impacts should be analyzed, including noise impacts, potential for discharges into the storm drain, accidental explosion or release of hazardous substances (e.g., lead discharge), fire hazards and impacts on fire protection services, other safety concerns due to the firing of guns and potential adverse effects due to traffic, such as traffic congestion. To the extent these impacts are determined to be significant, then they should be mitigated and the mitigation documented in a Mitigated Negative Declaration. Mitigation may include, but is not limited to, the following:

- The facility be constructed with impenetrable walls, adequate ventilation and lighting systems for a shooting range, and acoustical treatment for sound attenuation suitable for a firing range;

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[1] The training facility does not fall into the category of "accessory use" as defined in Section 113.0103.

[2] SDMC Section 131.0110(a) gives some discretion to the City Manager to determine the appropriate use category; however, this discretion does not authorize arbitrary determinations. In fact, SDMC Section 131.0110(c) allows for an amendment to the Use Regulations Table where a use category or subcategory cannot be determined. Any amendment will require City Council approval. Planning Commission review under Section 1517.0301(c)(2) provides another means for determining appropriate use, in order to avoid the problem of having to fit a square peg into a round hole.

[3] Even if this operation were only characterized as a shooting range and not a training facility, a shooting range is not a use authorized within this zone and would also trigger the need for Planning Commission review, regardless of the applicability of SDMC Section 53.10. *See also* SDMC Sections 131.0620(a), 131.0630(a) and 1517.0301(a).

[4] SDMC Section 112.0103 states: "When an applicant applies for more than one permit, map, or other approval for a single development, the applications shall be consolidated for processing and shall be reviewed by a single decision maker. The decision maker shall act on the consolidated application at the highest level of authority for that development as set forth in Section 111.1015. The findings required for approval of each permit shall be considered individually, consistent with Section 126.0105."

- The facility be operated in a manner that minimizes the possibility of a release of hazardous waste and/or hazardous waste constituents (e.g., fine powders of range lead); The facility collect, manage, and dispose of all unreacted gun powders and residues properly as hazardous waste;

- The facility label each container of hazardous waste generated on-site; and,

- The facility complete a Hazardous Waste Manifest for all hazardous wastes generated on-site, and use a registered hazardous waste transporter to transport hazardous wastes off-site to an authorized facility.

CONCLUSION

Because construction permits and other approvals were issued before discretionary approval of the underlying use had been obtained, a stop work order should be issued. The applicant should be required to submit a new application for discretionary approval in order to use the site as a law enforcement/security training facility where firearms will be used.[5] In addition, no Certificate of Occupancy under SDMC Section 129.0114 should be issued until all discretionary approvals have been obtained, including compliance with CEQA. If a Certificate of Occupancy has already been issued in error, then proceedings to suspend or revoke the Certificate should be initiated pursuant to SDMC Section 129.0118. This Office is open to considering additional information or facts as they become known; at such time, additional legal analysis may be appropriate.

MICHAEL J. AGUIRRE,
City Attorney

MJA:SRE:pev

[5] SDMC Section 129.0108 states, "After all required approvals, including any required *development permits*, have been obtained and all required fees have been paid, the Building Official may issue a *construction permit*. Construction shall not begin until the required permits have been issued." Section 129.0105(a) further states, "If a proposed *development* requires one or more *development permits*, the required *development permits* must be issued before an application is submitted for a *construction permit* except as provided in Section 129.0105(c)."

EXHIBIT E

EXHIBIT E

Neil Dymott
ATTORNEYS

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May 20, 2008

Mr. Kelly Broughton
Development Services
CITY OF SAN DIEGO
1222 First Avenue, MS 501
San Diego, CA 92101-4155

Dear Mr. Broughton:

We are in receipt of your letter dated May 19 that indicates the city "will not issue a certificate of occupancy" for the Blackwater Otay Mesa facility. Your letter states you reached this conclusion based on the "opinion from the City Attorney's office," dated May 16. We have grave concerns with you proceeding based on the City Attorney's memorandum, because the City Attorney's memorandum was fatally flawed. For the reasons explained below (and in the attached letter), we ask you to reconsider your letter of yesterday.

Our primary concern is that you proceeded without correct information. The City Attorney's May 16 memorandum stated that the "Office is open to considering additional information or facts as they become known; at such time, additional legal analysis may be appropriate." In an effort to provide the city with the additional information and facts the City Attorney requested, we submitted to the Mayor (copying you and the City Attorney) a letter outlining all relevant information and the appropriate legal analysis. We transmitted this letter to you yesterday, in the late afternoon. Your letter indicating the city would not issue the certificate of occupancy arrived very shortly thereafter.

Because of the close time proximity of the letters, and because your letter did not appear to have the benefit of the additional facts and information we provided, we have reason to believe our letters crossed in transmission. In an effort to make sure you have all possible information before you make a crucial decision in error, I am again summarizing below all salient facts and the appropriate legal analysis.

- **The City's Firearms Ban makes an exception for Target Ranges.** Normally, entities wishing to discharge firearms or explosives within city limits must apply for council approval, which is a discretionary process. However, the city law establishing this process clearly exempts target ranges. San Diego Municipal Code Section 53.10(d) reads: "Exceptions: This section does not apply to . . . target ranges." This code provision is

Neil Dymott

consistent with exemptions for target ranges outlined in state law, exemptions which exist undoubtedly to encourage facilities that teach the safe, effective use of firearms. Blackwater's facility will teach the safe, effective use of firearms and is therefore not subject to the city council approval process.

- **Blackwater's Otay Mesa location is a vocational facility.** A vocational facility is a school, other than a traditional university, where subjects are taught to facilitate a person's entry or continuing membership in a skilled or semi-skilled profession. Blackwater's Otay facility will teach men and women of the Navy how to properly learn the skills necessary to be successful in their vocation. The facility also has the capability of training local law-enforcement deputies and warehouse security guards on safe, effective apprehension techniques. Blackwater's Otay Mesa facility is therefore undoubtedly a vocational facility.

- **Vocational Facilities are permitted in Otay Mesa as a matter of right, after only ministerial review.** Two separate code provisions allow for vocational facilities in Otay Mesa. SDMC section 1517.0301(a)(1) specifically authorizes "All uses permitted in the IH-2-1 zone." Vocational facilities are permitted in the IH-2-1 zone under SDMC section 131.0622. Moreover, SMDC section 1517.0301(a)(8)(A) specifies that vocational facilities instructing on subjects related to permitted uses in Otay Mesa are also permitted. The Blackwater facility will instruct on a number of subjects related to permitted uses in Otay Mesa. Consequently, the facility is permissible as a matter of right.

- **A facility that is permissible as a matter of right need only undergo ministerial review and inspections. Our facility has undergone these inspections, and passed with flying colors.** The code specifies that facilities not subject to discretionary review must only meet the criteria outlined in the code. These include inspections for such things as the requisite number of fire exits and other safety-related features. Your staff repeatedly inspected the Blackwater Otay Mesa facility and repeatedly examined its plans. On April 29, we met with Chief Building Official Afsaneh Ahmadi for one final review. The next day, your department stamped all permits. Thus, Development Services has no discretion on whether to issue the Certificate of Occupancy, which is Blackwater's due, it having met all the criteria in the code. Indeed, you were quoted in the San Diego Union Tribune on May 15 saying that Blackwater's permits that your office had just issued were non-appealable, thereby recognizing that

Neil Dymott

Kelly Broughton
Development Services
May 22, 2008
Page 3

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they were nondiscretionary. To withhold our Certificate of Occupancy at this stage is completely improper and illegal.

- Non-Discretionary Permits are not subject to CEQA review. Under state law, only projects subject to discretionary review are subject to the CEQA process. Cal. Pub. Res. Code § 21080(b)(1). Blackwater's permits are non-discretionary. Thus your May 19 letter was in error when it stated Blackwater's permits for the Otay facility should be subject to CEQA review.

We stress that withholding Blackwater's Certificate of Occupancy will cause grave harm. It could jeopardize Blackwater's longstanding contract with the Navy, to train sailors in basic anti-terrorism tactics, training which is designed to avoid a repeat of the tragic attack on the U.S.S. Cole in 2000. Withholding the Certificate of Occupancy could diminish Blackwater's business reputation and organizational goodwill. It could cause harm to national security. And it likely constitutes a constitutional violation, since the city is treating Blackwater differently from all other permit applicants and taking these steps without affording Blackwater the process it is due.

We ask you to rescind or stay your May 19 letter and to issue the Certificate of Occupancy for Blackwater's Otay facility immediately. If we do not hear from you by close of business Friday, we will be forced to consider taking other steps to enforce and protect Blackwater's rights.

Very truly yours,

Neil, Dymott, Frank,
McFall & Trexler APLC

Michael I. Neil

MIN:km

cc: Mayor Jerry Sanders
City Attorney Michael Aguirre
Members of the City Council

Attachment: Letter from Blackwater dated May 19, 2008

EX. E

KMM9906.DOC

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

151242 - MB

May 23, 2008
14:48:42

Civ Fil Non-Pris
USAO #.: 08CV0926 CIVIL FILING
Judge..: MARILYN L HUFF
Amount.: $350.00 CK
Check#.: BC63323

Total-> $350.00

FROM: BLACKWATER LODGE AND
TRAINING CENTER VS KELLY
BROUGHTON, ET AL

ORIGINAL • VIA FAX

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

FILED 08 MAY 23 PM 2:48

I. (a) PLAINTIFFS
Blackwater Lodge and Training Center, Inc., a Delaware corporation, dba Blackwater Worldwide

DEFENDANTS
Kelly Broughton, The Development Services Department of the City of San Diego, Afshin Ohmadi, the City of San Diego

(b) County of Residence of First Listed Plaintiff Currituck County
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
Mayer Brown LLP (213) 229-9500
Bryan Daly (SBN 117901)
John Nadolenco (SBN 181128)
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071

Attorneys (If Known) BY: DEPUTY
'08 CV 0926 H WMc

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury— Med. Malpractice
- ☐ 365 Personal Injury — Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

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- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities – Other
- ☒ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence
- **Habeas Corpus:**
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus – Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity):**
42 U.S.C. Section 1983
Brief description of cause:
Defendants refuse to issue Certificate of Occupancy for political reasons and without providing predeprivation hearing

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND** $0.00
CHECK YES only if demanded in complaint: **JURY DEMAND:** ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE ______ DOCKET NUMBER ______

DATE May 23, 2008 SIGNATURE OF ATTORNEY OF RECORD [signature]

FOR OFFICE USE ONLY

RECEIPT # 151242 AMOUNT $350— APPLYING IFP ______ JUDGE ______ MAG. JUDGE ______

RB 05/23/08

JS 44 Reverse (Rev. 12/07)

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.